



WISCONSIN LEGISLATIVE COUNCIL

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TO: SENATOR KATHLEEN VINEHOUT

FROM: Anna Henning, Staff Attorney, and Larry Konopacki, Senior Staff Attorney

RE: 2013 Senate Bill 349, Relating to Local Regulation of Nonmetallic Mining, Air and Water Quality, Explosives, Highway Use Contracts, and Borrow and Material Disposal Sites

DATE: October 23, 2013

This memorandum responds to your request for a description of 2013 Senate Bill 349 ("the bill"), relating to local regulation of nonmetallic mining, explosives, borrow and material disposal sites, and certain environmental impacts, and to highway use agreements. The memorandum addresses several issues selected by your office, including the bill's effect on existing ordinances and permits, practical implications for various types of municipalities,¹ and options under the bill for municipal action to address an imminent threat to public safety.

THE BILL

The bill makes various changes affecting local authority to regulate nonmetallic mining and certain other activities. Several of those changes specifically relate to nonmetallic mining, whereas other changes are not specific to nonmetallic mining.² In addition to the changes affecting local regulatory authority, the bill includes provisions relating to liability for damage to highways and to the Department of Natural Resources (DNR)'s authority to establish air and water quality standards for nonmetallic mines.

¹ In general, the term "municipality," as used in this memorandum, refers to any city, village, town, or county.

² Under current law, unchanged by the bill, "nonmetallic mining" means all operations or activities for the extraction from the earth for sale or use by the operator of mineral aggregates or nonmetallic minerals such as stone, sand, gravel, asbestos, beryl, clay, feldspar, peat, talc, and topsoil, including such operations or activities as excavation, grading, and dredging. In addition, the term includes on-site processes that are related to the extraction of mineral aggregates or nonmetallic minerals, such as stockpiling of materials, blending mineral aggregates or nonmetallic minerals with other mineral aggregates or nonmetallic minerals, crushing, screening, scalping, and dewatering. [s. 295.11 (3), Stats.]

Changes Specific to Regulation of Nonmetallic Mining

The following changes specifically relate to the regulation of nonmetallic mining:

Authority to Enact and Enforce Non-Zoning Police Power Ordinances

Under *current law*, Wisconsin municipalities generally may regulate nonmetallic mining by enacting one of three general types of ordinances – nonmetallic mining reclamation ordinances, zoning ordinances, and non-zoning ordinances enacted pursuant to general police powers.³ Counties must, and towns, villages, and cities may, enact nonmetallic mining reclamation ordinances, which must comply with minimum reclamation standards promulgated by the DNR.

Zoning ordinances are ordinances adopted to promote the public health, safety, and welfare by regulating land use. In general, counties, cities, villages, and towns are authorized to enact zoning ordinances. However, special restrictions apply to town zoning.⁴

Municipal governments also exercise police powers to regulate public health, safety and welfare, other than by means of zoning ordinances. Under a 2012 Wisconsin Supreme Court decision, *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, a Wisconsin municipality may regulate nonmetallic mining pursuant to non-zoning police powers if the ordinance does not have characteristics that make it a “zoning ordinance.” The court emphasized that the review of any particular ordinance is fact-specific, but noted the following characteristics shared by traditional zoning ordinances:

- The division of a geographic area into multiple zones or districts.
- The allowance and disallowance of certain uses by landowners within established districts or zones.
- A purpose of directly controlling where, rather than how, a use takes place.
- The classification of uses in general terms and the attempt to comprehensively address all possible uses in a geographic area.
- A fixed, forward-looking determination about what uses will be permitted as opposed to a case-by-case, ad hoc determination of what uses the landowner will be allowed to conduct.

³ For more detailed information regarding local regulation of nonmetallic mining in Wisconsin, see *Regulation of Sand Mining in Wisconsin*, IM-2013-14, http://legis.wisconsin.gov/lc/publications/im/IM2013_04.pdf.

⁴ A town that is not authorized to exercise village powers may exercise zoning authority only if it is located in a county that has not enacted a county zoning ordinance. [s. 60.61 (2), Stats.] A town that is authorized to exercise village powers may enact zoning ordinances despite the existence of a county ordinance, subject to approval by town meeting or referendum, and approval by the county board. [s. 60.62, Stats.]

- The allowance by certain landowners to maintain their use of the land even though such use is not in conformance with the ordinance because the landowners' use of their land was legal prior to the adoption of the zoning ordinance.

[Zwiefelhofer, ¶¶ 36, 38-42.]

The bill prohibits counties, towns, cities, and villages from enacting or enforcing ordinances, except for zoning and nonmetallic mining reclamation ordinances, that apply to nonmetallic mining and regulate how a use of land takes place or that affect the use of land. The effect of that provision would be to restrict local regulation of nonmetallic mining through non-zoning police power ordinances that regulate or affect the use of land for nonmetallic mining. The bill generally does not affect local governments' zoning authority.

Codification of the Diminishing Assets Rule

Current law generally prohibits municipalities from enforcing zoning ordinances against "nonconforming uses," defined to mean uses that existed lawfully before a current zoning law took effect. Various statutory provisions limit the application of that protection, for example, when an original nonconforming use is expanded or discontinued. [See, e.g., ss. 60.61 (5) (am) and 62.23 (7) (h), Stats.]

However, as interpreted in various Wisconsin judicial decisions, particularly in the context of quarrying, a landowner who is excavating a natural resource is held to be "using" all of a given natural resource, including portions of the resource that are on contiguous land and have not yet been excavated. Thus, when determining the existing use that is to be protected as a nonconforming use, the right to continue to extract all of the natural resource previously allowed is protected. [See, e.g., *Smart v. Dane County Board of Adjustments*, 501 N.W.2d 782, 785 (Wis. 1993).] That legal interpretation is commonly referred to as the "diminishing assets rule," because it protects the use of a natural resource asset that has a value which diminishes as it is extracted. The practical theory supporting the rule is that it is not possible to excavate all parts of a natural resource at one time; thus, an operator should be allowed to continue excavation in the area. [*Sturgis v. Winnebago Adjustment Board*, 413 N.W.2d 642, 643 (Wis. Ct. App. 1987).]

The bill codifies the diminishing assets rule in the context of nonmetallic mining. Specifically, under the bill, a zoning ordinance may not prohibit the continued extraction of a nonmetallic mining mineral from a nonconforming nonmetallic mining location. The bill defines "nonconforming nonmetallic mining location" as land on which nonmetallic mining was occurring when nonmetallic mining became a nonconforming use, including land that is contiguous to such land if the contiguous land is under common ownership or control with the land on which the nonmetallic mining was occurring.

Nonmetallic Mining Reclamation Ordinances

Under *current law*, nonmetallic mining reclamation ordinances must include reclamation standards that meet or exceed standards promulgated by the DNR and set forth in

ch. NR 135, Wis. Adm. Code. The relevant DNR rules establish both general standards and standards specific to surface water and wetlands protection, groundwater protection, topsoil management, grading and slopes, topsoil redistribution, and revegetation and site stabilization. [ss. NR 135.07 through 135.12, Wis. Adm. Code.] Several of those standards reference generally applicable environmental standards. For example, the rules specify that nonmetallic mining reclamation must be conducted in a manner that does not cause pollutant limits set in the state's groundwater quality standards to be exceeded.

A municipality must deny an application for a nonmetallic mining reclamation permit if the municipality finds that the nonmetallic mining site cannot be reclaimed in compliance with the reclamation standards contained in the ordinance. [s. NR 135.22, Wis. Adm. Code.] The following general standards apply to nonmetallic mining operations under current law:

- **Refuse and other solid wastes.** Nonmetallic mining refuse must be reused in accordance with a reclamation plan. Other solid wastes must be disposed of in accordance with applicable DNR rules.
- **Area disturbed and contemporaneous reclamation.** Nonmetallic mining reclamation must be conducted, to the extent practicable, to minimize the area disturbed by nonmetallic mining and to provide for nonmetallic mining reclamation of portions of the nonmetallic mining site while nonmetallic mining continues on other portions of the nonmetallic mining site.
- **Public health, safety, and welfare.** All nonmetallic mining sites must be reclaimed in a manner so as to comply with federal, state, and local regulations governing public health, safety, and welfare.
- **Habitat restoration.** When a reclamation plan requires plant, fish, or wildlife habitat, the habitat must be restored, to the extent practicable, to a condition at least as suitable as that which existed before the lands were affected by nonmetallic mining operations.
- **Compliance with environmental regulations.** Reclamation of nonmetallic mining sites must comply with any other applicable federal, state, and local laws, including those related to environmental protection, zoning, and land use control.

[s. NR 135.06, Wis. Adm. Code.]

In addition, a municipality may issue a nonmetallic mining permit subject to general or site-specific conditions, if the conditions are needed to ensure compliance with the rules promulgated by the DNR. A municipality may not impose conditions as part of a nonmetallic mining reclamation permit that do not relate to reclamation of the nonmetallic mining site. [s. NR 135.21, Wis. Adm. Code.]

The bill prohibits DNR from establishing nonmetallic mining reclamation standards relating to water quality or quantity or air quality that are more restrictive than the generally applicable standards established by statute or rule in the state.

In addition, the bill prohibits municipalities from enacting or enforcing nonmetallic mining reclamation ordinances that do any of the following:

- Include a standard of air quality or water quality.
- Require a nonmetallic mining operator to obtain a permit or other form of approval in addition to a nonmetallic mining reclamation permit.
- Impose any requirement related to monitoring water quality or quantity or air quality.
- Include standards that are more restrictive than DNR's nonmetallic mining reclamation standards or the generally applicable standards under current law relating to air quality or water quantity or quality.

Generally Applicable Changes Relating to Local Government Authority

The following changes do not specifically relate to the regulation of nonmetallic mining. They are broadly applicable.

Local Environmental Regulations

Under *current law*, municipal actions in the area of environmental regulation are in some cases preempted under state or federal law. Where such actions are not preempted, municipalities generally may enact ordinances or take other actions that address environmental protection, if such action is within the scope of their police powers.

The bill prohibits municipalities, unless specifically required or authorized to do so by another statute, from taking certain actions relating to air and water pollution. Specifically, with the exception of the regulation of open burning, the bill prohibits municipalities from doing any of the following, unless statutorily authorized or required to do so:

- Establishing or enforcing a water quality standard, an ambient air quality standard, standard of performance for new stationary sources, or other emission limitation related to air quality.
- Issuing permits or any other form of approval related to air quality or water quality or quantity.
- Imposing any restriction related to air quality or water quality or quantity.
- Imposing any requirement related to monitoring air quality or water quality or quantity.

In addition, the bill specifies that certain general statutory authorities relating to home rule and public peace and good order may not serve as bases for the actions listed above.

Current law also authorizes a county, after consulting with cities and villages within the county, to establish and administer an air pollution control program. Such programs may, by ordinance, require stricter or more extensive air pollution control requirements than apply under state law. [s. 285.73, Stats.]

The bill repeals the authority for county-administered air pollution control programs.

Regulation of the Use of Explosives

Under *current law*, the Department of Safety and Professional Services (DSPS) must promulgate rules to ensure the safety of mines, explosives, quarries, and related activities. [s. 101.15 (2) (e), Stats.] At least in some circumstances, municipal ordinances regulating such activities might be found to be preempted by the DSPS rules.

The bill generally prohibits cities, villages, towns, and counties from regulating the use of explosives in connection with mining, quarrying, and related activities. However, the bill authorizes those municipalities to regulate blasting schedules by issuing a conditional use permit.

Highway Use Contracts

In general, under *current law*, no local authority may enact or enforce any traffic regulation that in any manner excludes or prohibits any motor vehicle from the “free use of all highways.” [s. 349.03 (2), Stats.] Thus, although municipalities are authorized to take certain actions to prevent damage to highways or recover money damages resulting from injuries to highways, current law does not otherwise appear to authorize municipalities to enter agreements that impose fees based on highway use (“highway use agreements”).

The bill authorizes counties, cities, villages, and towns to execute highway use agreements, with certain restrictions. The bill authorizes a municipality to enter into a contract with a highway user that requires the highway user to reimburse the governmental unit for the cost of repairs to a highway. Such repairs must be necessitated by actual damage to the highway caused by the highway user. The bill generally prohibits a municipality from imposing any other fee or other charge on a highway user.

Under the bill, a highway use agreement must satisfy all of the following requirements:

- The repairs to the highway are completed before reimbursement is required by the highway user.
- The proportion of damages to the highway caused specifically by the highway user and the cost of repairs attributable to that share of damages must be determined by an engineer chosen by agreement of the municipality and the highway user.

- The costs of the engineer's services are paid in equal shares by the highway user and the municipality.

In addition, under the bill, a highway use agreement may require a highway user to show proof of financial security sufficient to pay for the cost of repairs to a highway necessitated by actual damage to the highway specifically caused by the highway user. The proof of financial security may be provided in the form of a bond, deposit of funds, established escrow account, letter of credit, or a demonstration of financial responsibility by meeting net worth requirements or other form of financial assurance conditioned on the faithful performance of rules established by the DNR in the context of nonmetallic mining reclamation.

The proof of financial security must satisfy the following requirements:

- The amount of financial security required does not exceed the reasonable expected payments for damages expected to be caused during the three years following the date the amount is determined.
- The amount of financial security is determined by an engineer chosen by agreement of the municipality and the highway user.
- The costs of the engineer's services are paid in equal shares by the highway user and the municipality.
- The amount of financial security is not required to be recalculated more often than once per year, unless the highway user proposes changes to the highway user's proposed highway use that were not anticipated in the last calculation of financial security.

Liability for Damage to a Highway

Under *current law*, a person who injures a highway by specified actions or by "any other act" may be held liable to the municipality in charge of highway maintenance for treble damages. [s. 86.02, Stats.]

The bill limits the application of that statute to damage to a highway that is caused willfully or that results from an unlawful act. In addition, the bill provides that this statute does not apply to damage caused by a vehicle when the vehicle is operated under a highway use contract authorized under the bill.

Borrow and Material Disposal Sites

Under *current law*, municipal zoning ordinances are inapplicable to borrow sites⁵ and material disposal sites⁶ utilized by the Department of Transportation (DOT) in certain state

⁵ A "borrow site" means any site from which soil or a mixture of soil and stone, gravel, or certain other material is excavated for use in a specified DOT project.

highway construction and transportation projects. Zoning ordinances are inapplicable to such sites only if certain criteria are satisfied. [ss. 84.06 (12) and 85.193 (2), Stats.]

The bill retains the criteria under current law for inapplicability of zoning ordinances to certain borrow and material disposal sites, but it expands the scope of the exceptions under current law to apply to municipal actions other than zoning. Specifically, under the bill, no city, village, town, or county may enact or enforce any ordinance, resolution, or other requirement, including a zoning ordinance, that applies to the borrow sites and material disposal sites specified under current law.

EFFECT ON EXISTING ORDINANCES, PERMITS, AND USE AGREEMENTS

In general, the provisions of the bill that limit local regulation expressly apply to both the enactment and enforcement of ordinances and other requirements that are inconsistent with the bill. For that reason, the provisions of any local ordinance or other requirement that are prohibited under the bill would become unenforceable on the day following the bill's enactment. Certain other provisions limit the imposition of a restriction by a local government, and would likely be interpreted to apply to ongoing or future impositions of restrictions, including those made pursuant to existing permits and approvals.

With respect to highway use agreements, the bill provides for the modification or replacement of existing agreements. The bill authorizes any highway user that is a party to a highway use contract that is inconsistent with the requirements under the bill to petition the relevant municipality for the replacement or modification of any existing highway use agreement when the bill becomes effective. Upon receiving such a petition, the bill requires the municipality to participate in good faith in modifying or replacing the agreement. After a new or modified agreement is negotiated, any provisions of an existing agreement that are inconsistent with the bill's requirements automatically terminate.

PRACTICAL IMPLICATIONS FOR MUNICIPALITIES THAT HAVE ENACTED ORDINANCES REGULATING NONMETALLIC MINING

The bill's practical effect on municipalities that have enacted nonmetallic mining ordinances would vary based on the legal authority a given municipality relied upon when enacting such regulations. The bill will have relatively little effect on ordinances enacted pursuant to local zoning authority. The bill will have some effect on nonmetallic mining reclamation ordinances, particularly if such ordinances include standards that include provisions that exceed general standards for air and water quality or water quantity under state law, or impose monitoring conditions. Arguably, the bill's most significant practical impact will apply to municipalities that have enacted ordinances (other than nonmetallic mining reclamation ordinances) pursuant to non-zoning police powers.

⁶ A "material disposal site" means any site off of the transportation project property used for the lawful disposal of surplus materials from a transportation project and that is under the direct control of the transportation project contractor or subcontractor.

For example, if a municipality has enacted an ordinance prohibiting nonmetallic mining activities on any land within the municipality during a given time period, whether that ordinance is enforceable under the bill depends on whether it was enacted as a zoning ordinance or pursuant to non-zoning police powers. If the ordinance was enacted as a zoning ordinance, then its enforceability is not affected by the bill. If, instead, the ordinance was enacted as a non-zoning, general police powers ordinance, then it would not be enforceable following the bill's enactment.

Some municipalities may have relied on non-zoning police powers to regulate nonmetallic mining because a zoning change was practically or politically infeasible. For example, a town may have determined that it would lack county board approval for a zoning change. Arguably, the bill's practical effect will be most significant for municipalities in that situation.

AUTHORITY TO ADDRESS IMMINENT THREATS TO PUBLIC SAFETY CAUSED BY NONMETALLIC MINING PURSUANT TO POLICE POWERS

As described above, the bill generally prohibits cities, villages, towns, and counties from enacting or enforcing certain ordinances pursuant to non-zoning police powers. Specifically, a municipality is generally prohibited from enacting or enforcing such an ordinance if the ordinance is applicable to nonmetallic mining and regulates how a use of land takes place or affects the use of land. The bill retains municipal zoning authority and retains certain municipal authority relating to the enactment of nonmetallic mining reclamation ordinances.

If a given threat to public safety caused by nonmetallic mining activity is not regulated through a municipality's zoning or nonmetallic mining reclamation ordinance, the bill would limit the municipality's authority to address the concern through the enactment of a general police power ordinance that regulates how a use of land takes place or affects the use of land. The extent to which such authority would be limited under the bill may depend on the interpretation of the phrase "regulates how a use of land takes place or affects the use of land." In some circumstances, a municipality might successfully argue that certain actions taken pursuant to general police powers to prevent a threat to public harm, while relevant to nonmetallic mining activities, do not regulate how a use of land takes place or affect the use of land.

If you have any questions, please feel free to contact us directly at the Legislative Council staff offices.

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